

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Reduction of
Penalty Against:

SANDY WITZLING, M.D.

Petitioner.

Case No. 800-2013-002219

OAH No. 2014050625

DECISION AFTER NON-ADOPTION

This matter came on regularly for hearing before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, on August 5, 2014, at Los Angeles, California.

Petitioner, Sandy Witzling, M.D. (Petitioner), was present and was represented by Erin Muellenberg and David Witzling, Attorneys at Law.

Pursuant to the provisions of Government Code Section 11522, the Attorney General of the State of California was represented by Klint James McKay, Deputy Attorney General.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

The proposed decision of the administrative law judge was submitted to the Board on October 23, 2014. After due consideration thereof, the Board declined to adopt said proposed decision and thereafter on October 30, 2014 issued its Order of Non-Adoption. The Board has considered all written and oral arguments from the parties, and has read and considered the transcript and hearing exhibits, and pursuant to Government Code section 11517 now makes the following order:

FACTUAL FINDINGS

1. Petitioner is the holder of Physician and Surgeon Certificate Number A 30242.

2. By decision effective March 4, 2011, made pursuant to a Stipulated Settlement and Disciplinary Order, the Medical Board of California (Board) revoked Petitioner's certificate, stayed the revocation and placed Petitioner on probation for a period of seven years on specified terms and conditions, including but not limited to, a prohibition against surgical practice, completion of a clinical training program such as the Physician Assessment and Clinical Education Program at the University of California, San Diego (PACE), completion of an education course, completion of a medical records keeping course, retention of a practice monitor, a prohibition against solo practice, a prohibition against supervising physician assistants, and the cancellation of Petitioner's certificate if he fails to practice medicine¹ in California for a total of two years.

3. The discipline imposed on Petitioner's certificate arose out of allegations of gross negligence, repeated negligent acts, and incompetence with respect to five surgical patients, and an allegation of inadequate and inaccurate records in connection with one of those patients. Of those five patients, three died either intra-operatively or post-operatively. All five incidents occurred between the years 2003 and 2007.

4. Petitioner has met or exceeded all terms and conditions of his probation thus far except for Condition N, the failure to practice medicine. That condition reads:

In the event Respondent resides in the State of California and for any reason Respondent stops practicing medicine in California, Respondent shall notify the Board or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve Respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code. Review of patient charts or similar activities shall be considered practice of medicine for this purpose.

All time spent in an intensive training program which has been approved by the Board or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically canceled if Respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

¹ The practice of medicine is defined in Business and Professions Code sections 2051 and 2052.

5. In 2010, at the age of 65, Petitioner closed his general surgery practice after 31 years in the same location. At that time, he began a new phase of his career by gaining employment as a medical records reviewer for Accountable Health Care, an Independent Physicians Association (IPA)/Management Services Organization (MSO). He excelled in that work and earned high marks from his employer, John Ernsberger, M.D., for his expertise, thoroughness, professionalism, and work ethic.

6. However, in order for insurance carriers to become and remain accredited by the National Commission of Quality Assurance, the records on which they base their payments must be reviewed by reviewers who are not only physicians, but who hold unrestricted licenses. During an audit, Blue Cross discovered that Petitioner's medical certificate was restricted. Rather than lose the Blue Cross account and the accounts of several other carriers, Accountable Health Care terminated Petitioner's employment.

7. Petitioner attempted to find other work but other terms and conditions of his probation, such as the prohibition against supervising physician assistants, rendered him virtually unemployable. Should this situation continue, he will face the automatic, but involuntary, cancellation of his medical license.

8. On March 24, 2014, Petitioner's probation monitor, Verdeena Richardson, wrote to Petitioner to inform him that, because he had not practiced medicine in compliance with Condition N of his probationary terms, his probation was extended by 54 days. In that letter, Ms. Richardson also informed Petitioner that he would be required to complete a clinical training program before resuming the practice of medicine if his period of non-practice exceeded 18 months, and that his period of non-practice would count toward the two-year period that would result in the automatic cancellation of his license.

9. Petitioner has no desire to return to surgical practice, and he has no intention of doing so. He does not consider himself a danger to the public because he is "not going to be in surgery." He further stated, "Taking myself out of surgery I'm not anymore in harm's way." Petitioner has had no training in surgical techniques since 2010. Even if he were so inclined, re-opening his practice and obtaining malpractice insurance would be cost-prohibitive for him. Further, he strongly believes that, at his age, he would be unable to earn privileges at any California hospital pursuant to California Code of Regulations, title 22, sections 70035, 70701, subdivision (a), and 70703, subdivisions (a) and (b). Although Petitioner considers himself very knowledgeable, and the evidence supports that belief, he does not believe he could regain his technical surgical skills now that he has not performed surgery for four years. Therefore, he has chosen not to return to surgery if his probation is terminated. He desires to remain a medical records reviewer, a position at which he was competent and content.

10. Petitioner enrolled in PACE to satisfy the probationary term requiring him to complete a clinical training program. Bard C. Cosman, M.D., was Petitioner's PACE examiner for the Phase I oral-board-type exam which Petitioner took on July 6, 2011. Dr. Cosman was also Petitioner's preceptor in the five-day clinical education program in January 2012. The two phases constituted the entire PACE program. Dr. Cosman found Petitioner to

be a person of broad clinical experience and understanding who demonstrated sound clinical judgment. Because Petitioner was not up-to-date on peri-operative guidelines, they focused on that area of weakness, and Petitioner had no trouble in quickly gaining competence in that area. Dr. Cosman conceded that, because PACE participants do not perform surgery as part of the program, PACE preceptors can evaluate only medical knowledge and judgment, but not technical ability (i.e., the ability to perform surgery). However, he believed Petitioner when Petitioner told him he would not return to a surgical practice. Further, Dr. Cosman opined that there would be financial barriers to Petitioner's performing minor surgical procedures in a medical office, and that no hospital would risk granting privileges to a 70-year-old surgeon who has not practiced surgery for the past few years. Therefore, according to Dr. Cosman, terminating Petitioner's probation so he can serve as a medical record reviewer would be a public benefit rather than a risk because he would be exercising his sound medical judgment. Dr. Cosman described Petitioner as the "real thing" as a surgeon and "the kind of person you want licensed in California." Dr. Cosman admitted on cross-examination that if given an unrestricted license, Petitioner could do minor surgery in an office-based setting. He further admitted that if a surgeon was found to be at fault in multiple deaths, it would be advisable to have someone oversee his practice to prevent repeated incidents of death or injury to a patient.

11. Petitioner recognizes and acknowledges the errors he made in the surgeries that resulted in his license discipline, and he believes that his probation was necessary and reasonable. He is deeply remorseful for his mistakes. He has taken his probation seriously and has gone beyond the requirements of his probationary order to make himself a better physician and avoid being a danger to the public. This includes accruing continuing education credits well in excess of those required, attending mortality and morbidity conferences at Long Beach Memorial Hospital, watching videos that address surgical errors, and avidly reading medical journals in what he considers a never-ending quest for medical knowledge. He is certain he will not repeat his past errors because he never intends to practice surgery again.

LEGAL CONCLUSIONS

1. Petitioner has not established, by clear and convincing evidence to a reasonable certainty, that his Petition should be granted under the provisions of Business and Professions Code section 2307, by reason of Findings 4 through 11.

2. Petitioner bore the burden of proving both his rehabilitation and his fitness to practice medicine. (*Houseman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084; *Feinstein v. State Bar* (1952) 39 Cal.2d. 541.) Petitioner's burden required a showing that he was no longer deserving of the adverse character judgment associated with the discipline imposed against his certificate. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395.) As more specifically stated below, Petitioner has not satisfied his burden.

3. California Code of Regulations, title 16, section 1360.2 states:

When considering a petition for reinstatement of a license, certificate or permit holder pursuant to the provisions of Section 11522 of the Government Code, the division or panel shall evaluate evidence of rehabilitation submitted by the petitioner considering the following criteria:

(a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(b) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.

(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections (a) or (b).

(d) In the case of a suspension or revocation based upon the conviction of a crime, the criteria set forth in Section 1360.1, subsections (b), (d) and (e).

(e) Evidence, if any, of rehabilitation submitted by the applicant.

4. With the involvement of five patients and three deaths, Petitioner's acts are most certainly severe. However, they are temporally remote, with the most recent event occurring in 2007. Following the final event, Petitioner continued to practice general surgery for another three years without incident. He has not performed surgery since he closed his office in 2010 and, under the terms of his probation, he has not been permitted to do so since 2011. Since 2014, he has not practiced as a physician and surgeon and his training before and during probation alone is not sufficient to demonstrate that he can now safely return to the full and unrestricted practice of medicine.

5. Petitioner has met or exceeded all of the terms and conditions of probation except for the provision regarding the failure to practice medicine. Given his inability to work as a medical records reviewer because he is on probation, and his inability to find employment outside of direct patient care, Petitioner is faced with a difficult decision: Enter the practice of direct but non-surgical patient care, an area in which he has not practiced for between 30 and 40 years, but one which would allow him to meet the practice requirement of his probation, or face the automatic cancellation of his certificate.

6. Under the current probationary order, Petitioner is prohibited from performing surgery. At the administrative hearing, the Deputy Attorney General correctly pointed out that, if probation is terminated, Petitioner will be at liberty to practice surgery at his discretion and, although PACE determined that his medical knowledge and judgment are sound, it was not able to evaluate his surgical skills.

7. Petitioner is in essence asking the Board to allow him to practice as though he were issued a limited license, in that he seeks to have his practice limited to non-surgical practices. Short of issuing a limited license under section 2088, which Petitioner does not qualify for, the Board has no ability to terminate Petitioner's probation, while still limiting his practice. The Board's options under these circumstances are either a full unrestricted license, if consumer protection so warrants, or a probationary license. Because Petitioner has not engaged in the practice of medicine since early 2014, and since 2010 has limited his practice to medical records review, and given that the causes for discipline included harm to patients including the deaths of three patients, the Board's consumer protection mandate requires clear and convincing evidence that Petitioner has not only addressed all practice-related deficiencies, but that he is competent to practice both theoretically and clinically.

8. While Petitioner's credible testimony is supported by his PACE preceptor, Dr. Cosman who, without any stake in the matter, found Petitioner's medical knowledge and judgment sound and extensive when he was evaluated in 2011, and his statement that he did not intend to practice surgery any longer, believable, the Board is without statutory authority to issue a limited license to Petitioner, and the Board's consumer protection mandate dictates that it cannot issue a free and clear license under these circumstances.

ORDER

The Petition of Sandy Witzling, M.D. for termination of his probation is denied.

This Decision shall become effective on March 13, 2015.

IT IS SO ORDERED February 13, 2015.

A handwritten signature in black ink that reads "Dev Gnanadev MD". The signature is fluid and cursive, with the letters "Dev" and "Gnanadev" connected, and "MD" written separately to the right.

Dev Gnanadev, M.D., Chair
Panel B

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of Petition for Reduction of
Penalty Against:

SANDY WITZLING, M.D.

Petitioner.

Case No.: 8002013002219

OAH No.: 2014050625

**ORDER OF NON-ADOPTION
OF PROPOSED DECISION**

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted**. A panel of the Medical Board of California (Board) will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit directed to the question of whether the proposed penalty should be modified. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact Kennedy Court Reporters, 920 West 17th Street, Second Floor, Santa Ana, CA 92706-3576. Their telephone number is 1 (800) 231-2682.

To order a copy of the exhibits, please submit a written request to this Board.

In addition, oral argument will only be scheduled if a party files a request for oral argument with the Board within 20 days from the date of this notice. If a timely request is filed, the Board will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the proposed penalty should be modified. Please do not attach to your written argument any documents that are not part of the record as they cannot be considered by the Panel. The Board directs the parties attention to Title 16 of the California Code of Regulations, sections 1364.30 and 1364.32 for additional requirements regarding the submission of oral and written argument.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Board. The mailing address of the Board is as follows:

MEDICAL BOARD OF CALIFORNIA
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815-3831
(916) 263-2349
Attention: John F. Yelchak

Date: October 30, 2014



Dev Gnanadev, M.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
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PROPOSED DECISION

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Petitioner, Sandy Witzling, M.D. (Petitioner), was present and was represented by Erin Muellenberg and David Witzling, Attorneys at Law.

Pursuant to the provisions of Government Code Section 11522, the Attorney General of the State of California was represented by Klint James McKay, Deputy Attorney General.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Petitioner is the holder of Physician and Surgeon Certificate Number A 30242.

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2. By decision effective March 4, 2011, made pursuant to a Stipulated Settlement and Disciplinary Order, the Medical Board of California (Board) revoked Petitioner's certificate, stayed the revocation and placed Petitioner on probation for a period of seven years on specified terms and conditions, including but not limited to, a prohibition against surgical practice, completion of a clinical training program such as the Physician Assessment and Clinical Education Program at the University of California, San Diego (PACE), completion of an education course, completion of a medical records keeping course, retention of a practice monitor, a prohibition against solo practice, a prohibition against supervising physician assistants, and the cancellation of Petitioner's certificate if he fails to practice medicine¹ in California for a total of two years.

3. The discipline imposed on Petitioner's certificate arose out of allegations of gross negligence, repeated negligent acts, and incompetence with respect to five surgical patients, and an allegation of inadequate and inaccurate records in connection with one of those patients. Of those five patients, three died either intra-operatively or post-operatively. All five incidents occurred between the years 2003 and 2007.

4. Petitioner has met or exceeded all terms and conditions of his probation thus far except for Condition N, the failure to practice medicine. That condition reads:

In the event Respondent resides in the State of California and for any reason Respondent stops practicing medicine in California, Respondent shall notify the Board or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve Respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code. Review of patient charts or similar activities shall be considered practice of medicine for this purpose.

All time spent in an intensive training program which has been approved by the Board or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically canceled if Respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

¹ The practice of medicine is defined in Business and Professions Code sections 2051 and 2052.

5. In 2010, at the age of 65, Petitioner closed his general surgery practice after 31 years in the same location. At that time, he began a new phase in his career by gaining employment as a medical records reviewer for Accountable Health Care, an Independent Physicians Association (IPA)/Management Services Organization (MSO). He excelled in that work and earned high marks from his employer, John Ernsberger, M.D., for his expertise, thoroughness, professionalism, and work ethic.

6. However, in order for insurance carriers to become and remain accredited by the National Commission of Quality Assurance, the records on which they base their payments must be reviewed by reviewers who are not only physicians, but who hold unrestricted licenses. During an audit, Blue Cross discovered that Petitioner's medical certificate was restricted. Rather than lose the Blue Cross account and the accounts of several other carriers, Accountable Health Care terminated Petitioner's employment.

7. Petitioner attempted to find other work but other terms and conditions of his probation, such as the prohibition against supervising physician assistants, rendered him virtually unemployable. Should this situation continue, he will face the automatic, but involuntary, cancellation of his medical license.

8. On March 24, 2014, Petitioner's probation monitor, Verdeena Richardson, wrote to Petitioner to inform him that, because he had not practiced medicine in compliance with Condition N of his probationary terms, his probation was extended by 54 days. In that letter, Ms. Richardson also informed Petitioner that he would be required to complete a clinical training program before resuming the practice of medicine if his period of non-practice exceeded 18 months, and that his period of non-practice would count toward the two-year period that would result in the automatic cancellation of his license.

9. Petitioner has no desire to return to surgical practice, and he has no intention of doing so. Even if he were so inclined, re-opening his practice and obtaining malpractice insurance would be cost-prohibitive for him. Further, he strongly believes that, at his age, he would be unable to earn privileges at any California hospital pursuant to California Code of Regulations, title 22, sections 70035, 70701, subdivision (a), and 70703, subdivisions (a) and (b). Although Petitioner considers himself very knowledgeable, and the evidence supports that belief, he does not believe he could regain his technical surgical skills now that he has not performed surgery for four years. Therefore, he has chosen not to return to surgery if his probation is terminated. He desires to remain a medical records reviewer, a position at which he was competent and content.

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10. Petitioner enrolled in PACE to satisfy the probationary term requiring him to complete a clinical training program. Bard C. Cosman, M.D., was Petitioner's PACE examiner for the Phase I oral-board-type exam which Petitioner took on July 6, 2011. Dr. Cosman was also Petitioner's preceptor in the five-day clinical education program in January 2012. The two phases constituted the entire PACE program. Dr. Cosman found Petitioner to be a person of broad clinical experience and understanding who demonstrated sound clinical judgment. Because Petitioner was not up-to-date on peri-operative guidelines, they focused on that area of weakness, and Petitioner had no trouble in quickly gaining competence in that area. Dr. Cosman conceded that, because PACE participants do not perform surgery as part of the program, PACE preceptors can evaluate only medical knowledge and judgment, but not technical ability (i.e., the ability to perform surgery). However, he believed Petitioner when Petitioner told him he would not return to a surgical practice. Further, Dr. Cosman opined that there would be financial barriers to Petitioner's performing minor surgical procedures in a medical office, and that no hospital would risk granting privileges to a 70-year-old surgeon who has not practiced surgery for the past few years. Therefore, according to Dr. Cosman, terminating Petitioner's probation so he can serve as a medical record reviewer would be a public benefit rather than a risk because he would be exercising his sound medical judgment. Dr. Cosman described Petitioner as the "real thing" as a surgeon and "the kind of person you want licensed in California."

11. Petitioner recognizes and acknowledges the errors he made in the surgeries that resulted in his license discipline, and he believes that his probation was necessary and reasonable. He is deeply remorseful for his mistakes. He has taken his probation seriously and has gone beyond the requirements of his probationary order to make himself a better physician and avoid being a danger to the public. This includes accruing continuing education credits well in excess of those required, attending mortality and morbidity conferences at Long Beach Memorial Hospital, watching videos that address surgical errors, and avidly reading medical journals in what he considers a never-ending quest for medical knowledge. He is certain he will not repeat his past errors because he never intends to practice surgery again.

LEGAL CONCLUSIONS

1. Petitioner has established, by clear and convincing evidence to a reasonable certainty, that cause exists to grant the Petition under the provisions of Business and Professions Code section 2307, by reason of Findings 4 through 11.

2. Petitioner bore the burden of proving both his rehabilitation and his fitness to practice medicine. (*Houseman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084; *Feinstein v. State Bar* (1952) 39 Cal.2d 541.) Petitioner's burden required a showing that he was no longer deserving of the adverse character judgment associated with the discipline imposed against his certificate. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395.) Petitioner satisfied his burden.

3. California Code of Regulations, title 16, section 1360.2 states:

When considering a petition for reinstatement of a license, certificate or permit holder pursuant to the provisions of Section 11522 of the Government Code, the division or panel shall evaluate evidence of rehabilitation submitted by the petitioner considering the following criteria:

(a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(b) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.

(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections (a) or (b).

(d) In the case of a suspension or revocation based upon the conviction of a crime, the criteria set forth in Section 1360.1, subsections (b), (d) and (e).

(e) Evidence, if any, of rehabilitation submitted by the applicant.

4. With the involvement of five patients and three deaths, Petitioner's acts are most certainly severe. However, they are temporally remote, with the most recent event occurring in 2007. Following the final event, Petitioner continued to practice general surgery for another three years without incident. He has not performed surgery since he closed his office in 2010 and, under the terms of his probation, he has not been permitted to do so since 2011.

5. Petitioner has met or exceeded all of the terms and conditions of probation except for the provision regarding the failure to practice medicine. Given his inability to work as a medical records reviewer because he is on probation, and his inability to find employment outside of direct patient care because of other probationary terms and conditions such as the prohibition against supervising physician assistants, Petitioner is faced with a difficult decision: Enter the practice of direct but non-surgical patient care, an area in which he has not practiced for between 30 and 40 years, or face the automatic cancellation of his certificate.

6. Under the current probationary order, Petitioner is prohibited from performing surgery. At the administrative hearing, the Deputy Attorney General correctly pointed out that, if probation is terminated, Petitioner will be at liberty to practice surgery at his discretion and, although PACE determined that his medical knowledge and judgment are sound, it was not able to evaluate his surgical skills.

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7. Since Petitioner has met or exceeded the terms and conditions of probation thus far (except for Condition N), and he has satisfied most of the criteria of rehabilitation set forth in California Code of Regulations, title 16, section 1360.2, the decision whether to terminate probation turns on the probability of Petitioner's returning to a surgical practice if his probation is terminated. The decision must take into account Petitioner's credible testimony under oath that he does not intend to practice surgery, that he has no desire to do so, and that, even if he had such a desire, he is unable to do so. After closing his surgical practice, Petitioner found a niche in medical record reviews. He enjoyed the work and was well-respected for his knowledge, professionalism, and work ethic. Had he been permitted to continue that work with a probationary license, the instant matter may well have never come before the Board. Petitioner credibly testified that he requests early termination of probation solely for the purpose of returning to that work.

8. Petitioner's credible testimony is supported by his PACE preceptor, Dr. Cosman who, without any stake in the matter, found Petitioner's medical knowledge and judgment sound and extensive, and his statement that he did not intend to practice surgery any longer, believable.

9. Even if Petitioner were to change his mind and decide he wanted to return to surgical practice, the probability of his being able to do so is sufficiently remote that the public faces very little risk by probation termination.

a. First, after an absence from the operating room for four years, at approximately 70 years of age, Petitioner no longer feels competent to perform surgery, and he refuses to practice surgery absent that competence.

b. Second, California Code of Regulations, title 22 (Regulation), section 70701, subdivision (a)(7) requires all members of a hospital's medical staff to "demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the staff at the time of original application for appointment to the staff and at least every two years thereafter." Regulation 70703, subdivision (b) requires a hospital's medical staff to establish bylaws that provide formal procedures for evaluating, among other things, staff applications and credentials, appointments, reappointments, and assignment of clinical privileges. Regulation section 70701, subdivision (a)(1)(E), states: "Membership on the medical staff . . . shall be restricted to physicians competent in their respective fields, worthy in character and in professional ethics."

c. Petitioner closed his surgical practice in 2010. Having lost his patient base, and having been unemployed since he was discharged from Accountable Health Care because of his license status, it is highly unlikely that he would, at this stage of his career, incur the start-up and overhead expenses, including malpractice insurance, to open another surgical practice for the purpose of performing simple outpatient procedures.


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10. It is well-established that a physician is not a “warrantor of cures.” (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 475.) Untoward results can occur in the absence of negligence or incompetence, and even an experienced surgeon with no history of discipline can perform negligently on a given day and experience a bad result. Yet, the likelihood that Petitioner will experience another bad surgical result is probably less than that for the experienced surgeon with an unrestricted license because Petitioner has no intention of practicing surgery, and the harsh realities of today’s medical practice (obtaining hospital privileges, office operating expenses, malpractice insurance, etc.) coupled with his age and time away from the operating room, render his return to surgical practice extremely unlikely. Although Petitioner will be free to practice surgery if probation is terminated, the evidence that he will not do so was both convincing and uncontradicted.

ORDER

The Petition of Sandy Witzling, M.D. for termination of his probation is granted. Physician and Surgeon’s Certificate No. A 30242 is fully restored.

Dated: August 12, 2014


H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings